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ALEXANDER L. STEVAS,
CLERK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL SCHUSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

A. Whether the District Court erred in trying Petitioner SAMUEL SCHUSTER on stipulated facts without obtaining adequate waivers from Schuster of his fundamental constitutional rights to confront and cross-examine witnesses, to be present at trial, and to proceed to trial by jury?

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Petitioner Samuel Schuster respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on June 4, 1984.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears as Appendix "A" attached hereto. The District Court did not render any formal findings regarding Mr. Schuster's waiver of rights. The acceptance of the stipulation was rendered orally. A copy of the pertinent portion of the transcript of the trial is attached as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1984. A timely petition for rehearing with a suggestion for a rehearing *en banc* was filed. This rehearing petition was denied on August 10, 1984. The jurisdiction of this court is invoked pursuant to 62 Stat. 928, 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution that provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ., to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ."

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT.

This petition is from the criminal conviction of the Petitioner SAMUEL SCHUSTER on a charge of conspiracy, in violation of 18 U.S.C. Section 371. Petitioner was convicted after a court trial on stipulated facts in the United States District Court for the Central District of California, before the Honorable A. Wallace Tashima, United States District Judge.

B. COURSE OF THE PROCEEDINGS.

1. On December 12, 1982, the Grand Jury for the Central District of California returned a second-superceding indictment, charging Samuel Schuster and eleven (11) others with violations of federal law. The second-superceding indictment contained nine counts.

2. The trial of Samuel Schuster and five (5) co-defendants began on March 8, 1983. On March 30, 1983, the Honorable A. Wallace Tashima, United States District Judge Presiding, granted a mistrial as to petitioner Schuster and several other defendants and severed their trial from that of other co-defendants. Trial of two co-defendants continued and resulted in conviction. Mr. Schuster was not present during the trial of these co-defendants.

3. On May 19, 1983, Petitioner Samuel Schuster appeared in court for trial. Trial by jury was waived by written waiver and Mr. Schuster proceeded to trial on count one of the indictment on stipulated facts. He was found guilty by the trial judge. Count one charged a violation of 18 U.S.C. Section 371, conspiracy. An agreement entered into by the government and Mr. Schuster provided that if Mr. Schuster was found guilty, the government would move to dismiss the remaining counts at the time of sentencing.

4. On July 18, 1984, Petitioner Schuster was sentenced. He received the maximum sentence of five (5) years custody and a $10,000 fine. On the government's motion, the remaining counts were dismissed.

5. A timely Notice of Appeal to the United States Court of Appeals for the Ninth Circuit was filed.

6. On June 4, 1984, the Ninth Circuit affirmed Petitioner Schuster's conviction. A petition for rehearing with a

suggestion for rehearing *en banc* was denied on August 10, 1984. (See Appendix "C" attached.)

C. STATEMENT OF FACTS.

Petitioner Samuel Schuster, along with eleven others, was charged in a nine-count indictment by a grand jury in the Central District of California with violating several federal statutes, including 18 U.S.C. Section 371, conspiracy. The essence of the charges were that Petitioner and the other indicted defendants were engaged in a scheme to launder money and traffic in narcotics.[1]

Although some of the defendants exercised their constitutional right to a jury trial, Mr. Schuster did not. Instead, he was tried on "stipulated facts". Pursuant to an agreement reached between government and defense counsel on May 19, 1983, Mr. Schuster appeared in court for "trial." Mr. Schuster waived trial by jury and signed a stipulation of facts. The stipulation stated that in exchange for Mr. Schuster's agreement to proceed to trial on Count I on stipulated facts, the government agreed to move at the time of sentencing to dismiss the remaining counts in the event Mr. Schuster was found guilty on Count I. The stipulation did not set forth any of Mr. Schuster's fundamental constitutional rights, and did not contain any provisions waiving those rights.

The stipulation contained several assertions of fact. In addition to these assertions, the stipulation provided that the trial testimony of Dorothy Hackett and Larry Lyons could be considered by the trial court. These two individuals testified at the trial of Mr. Schuster's co-defendants. The Honorable A. Wallace Tashima, United States District Judge, presided over both the co-defendants' trial

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[1]The facts underlying the indictment are unimportant to the contentions presented herein.

and Mr. Schuster's stipulated facts trial. The testimony of Hackett and Larry Lyons was not set forth within the stipulation. There is no evidence in the record that Mr. Schuster was aware of what that testimony was, nor is there any evidence that he was present in court when that testimony was presented. The trial court did not inquire as to Mr. Schuster's knowledge of the testimony.

Before accepting the stipulation and rendering a verdict, the court and Mr. Schuster's trial counsel[2] engaged in some brief colloquy. Defense counsel advised the court that:

> "This is going to be . . . a trial on a series of stipulated facts which have been presented to me, executed by me, read by me to Mr. Schuster, and executed by him."

Defense counsel continued:

> "Mr. Schuster has executed his name to the waiver of jury trial with the understanding that your Honor will sit as trier of the law and facts.
>
> He has been advised by me that, even though we are proceeding in this rather streamlined form, that the government still has the ultimate obligation of proving the elements of the crime charged to the exclusion of every reasonable doubt.
>
> He has also been advised by me [of his right to appeal and his right to bond pending appeal.]"

The Court's only question to Mr. Schuster followed these comments by defense counsel. The court asked Mr. Schuster:

> "Mr. Schuster, do you concur in the comments made by your attorney that these are the

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[2]At trial, Mr. Schuster was represented by Raymond Takiff, Esq. New counsel was retained for appeal purposes.

> conditions under which you executed the stipulations of fact and the waiver of trial by jury?"

Mr. Schuster was never asked whether he knew the nature or details of the testimony being admitted through the stipulation; he was never asked whether he knew what effect a stipulation had; he was never asked whether he knew of and waived his sixth amendment rights to confront the cross-examine witnesses; he was never asked whether he knew of his right to be present at all stages of a trial; he was never asked whether he knew what the maximum penalty for the crime charged was; he was never asked whether he knew what the agreement between his counsel and the prosecutor regarding this stipulation was. Indeed, Mr. Schuster was never asked whether he understood the proceeding in court and desired to proceed by stipulated facts.[3]

After accepting the stipulation, the court invited argument on the charge. Despite the argument of defense counsel, the court found Mr. Schuster guilty on Count I. In oral statements regarding the verdict, the court noted that:

> "[T]he reason I don't hesitate much [in finding Mr. Schuster guilty] is because I sat through one trial and heard a number of other people on this matter. . . .
>
> In the face of the stipulation, and having heard the testimony of Dorothy Hackett, I just have to conclude that the guilt of this defendant

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[3]The absence of any inquiry into Mr. Schuster's understanding of the procedure is particularly striking because the stipulation itself indicates that Mr. Schuster had problems, as recently as when the alleged crime occurred, understanding English. There is no indication in the record that an interpretor was present to translate for Mr. Schuster. Further, there is no indication in the record that the trial court asked Mr. Schuster if he understood the stipulation as read to him.

> Samuel Schuster on count one is proved beyond a reasonable doubt."

After finding Mr. Schuster guilty, the court set a date for sentencing. At sentencing, Mr. Schuster received the maximum possible sentence — five years custody and a fine of $10,000. The remaining counts were dismissed at the time of sentencing.

The Court of Appeals for the Ninth Circuit affirmed Mr. Schuster's conviction on appeal, and denied both a rehearing and rehearing *en banc.*

In a *per curiam* opinion, the court of appeals held that Rule 11 of the Federal Rules of Criminal Procedure does not require that the trial court advise a defendant of his right to confront and cross-examine witnesses "where trial by jury is waived and the issue of guilt is determined from stipulated facts." *(See* Appendix "A".) The court of appeals decision held that because Mr. Schuster "voluntarily consented to a court trial based on stipulated facts", the decision must be affirmed.[4]

REASON FOR GRANTING THE WRIT

PRIOR TO HOLDING A TRIAL ON STIPULATED FACTS, THE TRIAL COURT MUST ASCERTAIN THAT THE DEFENDANT IS KNOWINGLY WAIVING CONSTITUTIONAL RIGHTS

A. The Contention.

Petitioner Samuel Schuster contends that the trial court erred in trying him on stipulated facts, without first ascertaining whether Mr. Schuster knowingly and intentionally consented to the stipulated facts trial. He *does not*

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[4]For the reasons set forth within, it is clear that the court of appeals decision finding a voluntary waiver is in error.

contend that prior to a stipulated fact trial, the trial court must advise him pursuant to the litany provided for guilty and *nolo contendre* pleas in Rule 11 of the Federal Rules of Criminal Procedure.[5] Instead, he contends only that the trial court must ascertain that the waiver of rights implicit in a stipulated facts trial is entered into knowingly and intelligently. The courts of appeals that have discussed the issue raised here are in conflict as to how this waiver is to be ascertained. Some courts of appeals have alluded to the need for guidance from this Court on the issue raised herein.

Rule 17 of the Rules of the Supreme Court specify that such a conflict among circuits is a reason for granting a writ.

B. The Current State of the Law.

A stipulated facts trial can take several forms. It can consist of, among other things, stipulations to ultimate facts, or stipulations that had the matter gone to trial, certain testimony would be elicited. Regardless of its form, however, certain things occur in all the stipulated facts trials. In such trials, there are no live witnesses;

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[5]On its face, the litany required by Rule 11 of the Federal Rules of Criminal Procedure applies only to guilty and *nolo contendre* pleas. Contrary to the Circuit Court's opinion, Mr. Schuster never contended that he was entitled to have the full Rule 11 litany recited based on the applicability of Rule 11 to stipulated facts trials. Rather, his contention below was — as it is to this court — that fundamental constitutional rights such as the right to confront witnesses must be waived, if at all, knowingly and intelligently. It should be noted, however, that there is a split among the circuits about whether the Rule 11 litany must be given prior to a stipulated facts trial. *Compare Julian v. United States*, 236 F.2d 155, 158 (6th Cir. 1956) (where stipulation in essence a plea of guilty, trial judge should comply with Rule 11), *with United States v. Strother*, 578 F.2d 397, 404-405, (D.C.Cir. 1978) (although stipulated fact trial does not require compliance with Rule 11, trial judge must ensure that defendant knowingly enters a stipulation).

instead, evidence is elicited through written stipulation. In such trials, there is no jury.

It is obvious that when a criminal defendant proceeds to trial on stipulated facts, several fundamental constitutional rights are implicitly waived. Although there is no reason to prevent a defendant from making such a waiver, this Court has always held that when a constitutional right is waived, the waiver must be both knowing and intelligent. *See Johnson v. Zerbst,* 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abondonment of a known right. . . .")

When a defendant proceeds to trial on stipulated facts, he waives his right to a jury trial, to confront and cross-examine witnesses, and to testify on his own behalf. Moreover, in some stipulated facts trials, other fundamental constitutional rights, such as the right to be present at all stages of a trial, might be waived. *Taylor v. United States,* 414 U.S. 17 (1973). (Criminal defendant has constitutional right to be present at trial.)

The question of what advice a trial judge must give a defendant proceeding to trial on stipulated facts has frequently arisen in, and consistently troubled, the courts of appeals. One federal court, commenting on the frequency with which this issue arises, alluded to the need for a set rule. *United States v. Strother,* 578 F.2d 397, 404 (D.C.Cir. 1978). The *Strother* court suggested that trial courts, in stipulated facts trial, advise the defendant pursuant to at least part of the Rule 11 litany. As the court noted:

> "Some effort by trial judges along these lines would not only eliminate appeal issues of the kind we now confront, but could also usefully provide a basis for the rulemaking machinery of the federal court system to consider, against a

> background of some experience, the formulation of a rule addressed explicitly to this phenomenon, which is a frequently recurring one. As the Government observed in its brief on this appeal . . ., it is 'obviously preferable to have a procedure which would show clearly that a defendant understands the consequences of a stipulated trial. . . .' ". *Id.* at 404-05.

See also Witherspoon v. United States, 633 F.2d 1247, 1251 (6th Cir. 1980), *cert. denied,* 450 U.S. 933 (1981) ("Three courts of appeals have considered the basic issues with which we grapple.")

With the exception of the instant case, the current law requires that for a stipulation of facts to be accepted by the trial court as a trial, there must be an effective waiver of rights by the defendant. Although in theory the law is clear, in the absence of a bright line test such as that embodied in Rule 11 for guilty pleas, the courts of appeals have issued a series of unclear and inconsistent opinions.

In addressing the issue of voluntariness of waivers, the Ninth Circuit — prior to the instant case — engaged in an examination of the record to find an effective waiver. For example, the court, in *United States v. Terrack,* 515 F.2d 558 (9th Cir. 1975), examined the record and found a voluntary waiver when the trial court personally addressed the defendant, advised him of his right to a jury trial, right to confront and cross-examine witnesses, and right to have the case proven beyond a reasonable doubt. *Id.* at 560 n. 2.[6] Further, the *Terrack* court noted that the stipulation

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[6]The *Terrack* court set forth the colloquy between the trial judge and the defendant:

> "THE COURT: Very well. Mr. Terrack, you are, of course, entitled to a trial by jury and you are entitled to be confronted with all witnesses against you, to cross-examine those witnesses. And you are entitled to insist that the Government prove their

itself was short, straight-forward, and simple. *Id.* at 560. The court, unfortunately, did not set forth any bright line test or set of factors to be met to insure voluntariness. *See also United States v. Garcia,* 450 F.2d 287, 288 (9th Cir. 1971) (stipulated facts trial upheld where record reveals trial court carefully questioned defendant as to his knowledge of the stipulation and consent to its being filed); *United States v. Miller,* 588 F.2d 1256, 1264 (9th Cir. 1978), *cert. denied,* 440 U.S. 947 (1979) (stipulated fact trial acceptable where the trial court ascertained from defendant that stipulation and waivers were understood).

Similarly, in *United States v. Stalder,* 696 F.2d 59 (8th Cir. 1982), the court carefully examined the record to determine the voluntariness of entering the stipulation. The *Stalder* court noted that with a stipulated facts trial, "the question is whether the defendant was sufficiently addressed 'as to the rights that [he] surrendered as a result of signing the stipulation.' " *Id.* at 62 (citations omitted). The court continued: "The important question is whether the defendant knew what he was doing when he entered into the stipulation." *Id.* In examining the record, particularly the colloquy between the defendant and the court, the *Stalder* court determined that the defendant understood

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case beyond a reasonable doubt. By signing the stipulation agreeing to it you are virtually stipulating to the facts which indicate your guilt. Do you understand that?
THE DEFENDANT: Yes, sir, I do.
THE COURT: And that for all intents and purposes this is a guilty plea except for the fact that you are doing it in this manner in order to reserve the rights or your position which you asserted on the motion for dismissal?
THE DEFENDANT: Yes, sir, I do.
THE COURT: And with that knowledge you are then waiving those rights and agreeing that this stipulation may be signed.
THE DEFENDANT: Yes, sir, I did.
THE COURT: Very well. The stipulation will be received. . . ."
515 F.2d at 560 n. 2.

what he was doing. The colloquy revealed that the defendant was told he would be found guilty, that he heard the stipulation recited in open court, and that he agreed to proceed that way. *Id.* at 60-61.

In *United States v. Strother,* 578 F.2d 397 (D.C. Cir. 1978), the court held that although the Rule 11 litany is not required in stipulated facts trials, the trial judge should on the record satisfy himself that the defendant knows what he is doing. *Strother* noted that this might require the trial judge to give some of the Rule 11 advisements. The court stressed that proceeding by stipulated facts involves much more of a waiver than is ordinarily associated with merely waiving a jury trial and proceding by court trial. Thus, the court wrote, "the trial judge should arguably be at some special pains to satisfy himself that the defendant is fully informed about precisely what he is giving up." *Id.* at 404. One way of doing so, noted the court, would be to advise the defendant pursuant to at least part of the Rule 11 litany. In footnote, the court noted which of the Rule 11 advisements would be appropriate. *Id.* at 404, n. 6. *See also United States v. Robertson,* 698 F.2d 703, 708-09 (5th Cir. 1983) (generally, no need for Rule 11 litany in stipulated fact trial; sufficient that record shows knowing and voluntary waiver of constitutional rights); *Cox v. Hutto,* 589 F.2d 394, 396-98, n. 2 (8th Cir. 1979) (stipulating to existence of prior convictions valid only if defendant knowingly and voluntarily enters stipulation); *United States v. Lawriw,* 568 F.2d 98, 105 n. 13 (1977), *cert. denied,* 435, U.S. 969 (1978) (although Rule 11 litany not required in stipulated fact trial, this stipulation acceptable because trial court addressed defendant as to rights surrendered by signing stipulation.)

C. Ineffective Waivers Were Taken In The Instant Case.

The instant case illustrates the need for a set rule or bright line test for accepting the waivers implicit in a stipulated facts trial. In this case, Petitoner Schuster proceeded to trial on stipulated facts. As the stipulation indicates, approximately one year prior to trial, Mr. Schuster was not fluent in English.

The stipulation in this case contained several pages of facts and incorporated by reference the testimony of two individuals, Dorothy Hackett and Larry Lyons. The trial judge in Mr. Schuster's case also presided at the trial where Ms. Hackett and Mr. Lyons testified. This testimony was not set forth in the stipulation. This testimony weighed heavily in the trial court's verdict of guilty. (See Appendix B.)

The total colloquy between Mr. Schuster and the court, and Mr. Schuster's counsel and the court, regarding this stipulation is set forth above (*See* pp.5-6, *supra*). At no time did the court ascertain from Mr. Schuster whether he knew what rights he was waiving by proceeding by stipulated facts. The court never even determined whether Mr. Schuster was aware of the content of the testimony incorporated in the stipulation.[7] Indeed, the only question posed to Mr. Schuster by the court concerned Mr. Schuster's awareness of his right to appeal an adverse ruling and remain on bond pending that appeal. The court did not ask Mr. Schuster whether he understood the agreement between his counsel and the government that certain counts would be dismissed.

By proceeding on stipulated facts, Mr. Schuster effectively waived his right to confront and cross-examine

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[7]There is nothing in the record to indicate that Mr. Schuster was aware of the content of the incorporated testimony.

witnesses, his right to a jury trial, and, because testimony given in his absence was incorporated in the stipulation without being set forth within the stipulation — and without being explained to Mr. Schuster — his right to be present at trial.[8] These are all substantial constitutional rights which can only be waived knowingly and intelligently. No such waiver appears in the record in this case.

Indeed, not only did the trial court not advise Mr. Schuster of these fundamental rights, there is nothing in the record to indicate that Mr. Schuster's counsel advised him of these rights. Counsel for Mr. Schuster stated only that he advised Petitioner of the government's obligation to prove its case beyond a reasonable doubt, his right to appeal an adverse ruling, and his right to bond pending appeal. He further stated that these were "the only conditions Mr. Schuster has been told about by me. . . ." On this record, no knowing and voluntary waiver can be found. (*Compare* with *United States v. Terrack*, 515 F.2d 558, at n. 2 (9th Cir. 1975), in which defendant specifically advised of right to jury trial, right to confront and cross-examine witnesses.) (*See* note 6, *supra.*)

Not only did the court not advise Mr. Schuster of the rights he was waiving, he was never asked if he knew the contents of the stipulation, or if he understood the stipulation. In the cases where a stipulated fact trial has been upheld, at least these basic questions are posed by the trial court. *See, e.g., United States v. Stalder*, 696

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[8]The right of a criminal defendant to be present at all stages of a trial is both a constitutional right and a statutory right. *Taylor v. United States*, 414 U.S. 17 (1973), acknowledged that an accused's right to be present is guaranteed by the confrontation clause of the sixth amendment. Further, Rule 43 of the Federal Rules of Criminal Procedure provides that a defendant has a right to be present at trial. Waiver of the right to be present must be knowing and voluntary, as any waiver of a fundamental constitutional right. *See Taylor*, 414 U.S. at 19-20.

F.2d 59, 60-61 (8th Cir. 1982) (stipulation read by trial court to defendant; defendant advised of its effect); *United States v. Strother*, 578 F.2d 397, 402-03 (D.C. Cir. 1978) (stipulation orally outlined in court in presence of defendant); *United States v. Terrack*, 515 F.2d 558, 560 (9th Cir. 1975) (stipulation signed by defendant contains all facts stipulated to; trial judge questioned defendant as to his knowledge of consequences of entering stipulation); *Witherspoon v. United States*, 633 F.2d 1247, 1249-50 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981) (content of stipulation orally placed on record in defendant's presence; defendant interrogated as to his understanding of content).

It is inconceivable that a stipulation could be accepted when the record does not indicate that the defendant is aware of the contents of the stipulation and the stipulation incorporates a substantial amount of material that is not set forth in the body of the stipulation. Clearly, absent an awareness of the contents of the stipulation, it cannot be said that entry into a stipulation is knowing.[9] The court of appeals, in its opinion, did not address the issue of Schuster's awareness of the content of the stipulation. Indeed, the court assumed without a shred of analysis that the stipulation was entered voluntarily and stated, without any citation to the record, that the trial court arrived at the same conclusion.[10]

There is no question but that the sixth amendment rights waived by a stipulated facts trial are substantial rights

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[9]Particularly in a case such as this, when the trial court specifically relies on the incorporated information in rendering its verdict, some effort must be made to insure the defendant is aware of the incorporated material.

[10]It is not surprising that the court of appeals did not cite the record. There is nothing in the record to support a finding that this stipulation was entered voluntarily.

which can only be waived by knowing and intelligent waiver.[11] Such a waiver cannot be presumed. In the absence of such a waiver, the stipulation could not be accepted.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that Certiorari should be granted.

Respectfully submitted,

MICHAELSON, WITHEY & LEVINE
ALVIN S. MICHAELSON
Attorneys for Petitioner
SAMUEL SCHUSTER

DATED: October 9, 1984

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[11]The circuit court, in the last line of its opinion, states that Mr. Schuster "voluntarily consented to a court trial." (*See* Appendix "A"). The court comes to this conclusion without any analysis or a single cite to the trial record. For the reasons set forth above, this conclusion is in error. Further, even if the conclusion was correct, that would not end the inquiry. The question is not just whether Mr. Schuster consented to a court trial, but also whether he waived his right to confront and cross-examine witnesses, and his right to be present at trial. The lower court opinion fails to even address these issues.

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SAMUEL SCHUSTER, Defendant-Appellant.	No. 83-5178 D.C. No. CR 82-518-B-AWT OPINION

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding
Argued and Submitted May 7, 1984

BEFORE: GOODWIN, SNEED and ALARCON, Circuit Judges.

PER CURIAM:

Samuel Schuster (Schuster) appeals his conviction for conspiracy to launder money in currency transactions related to narcotics activities in violation of 18 U.S.C. §371.

We are called upon to decide whether Rule 11 of the Federal Rules of Criminal Procedure and the law of this circuit require that a trial court advise a defendant of his right to confront and cross-examine the government's witness where trial by jury is waived and the issue of guilt is determined from stipulated facts.

Schuster was charged in six counts with violations of laws prohibiting money laundering and narcotics traffick-

ing. In exchange for Schuster's consent to waive his right to trial by jury and to allow the court to determine his guilt concerning count one on stipulated facts, the government agreed to dismiss the remaining counts if the court found Schuster guilty.

Schuster's trial counsel advised the court that this was to be "a trial on a series of stipulated facts which have been presented to me, executed by me, read by me to Mr. Schuster, and executed by him." After questioning Schuster, the court concluded that the defendant knowingly concurred in a trial based on stipulated facts and personally waived his right to trial by jury. The court did not expressly advise Schuster of his sixth amendment right to confrontation.

Schuster now contends that the judgment must be reversed because of the court's failure to admonish him or his right to confrontation. Schuster suggests that we should apply the rule adopted by the California Supreme Court in *In re Mosley,* 1 Cal.3d 913, 83 Cal.Rptr. 809, 464 P.2d 473, *cert. denied,* 400 U.S. 905 (1970), and compel a trial judge to advise a defendant of his right to confrontation before accepting his consent to the presentation of the government's evidence upon a stipulated set of facts that are "tantamount to a plea of guilty." *Mosley,* 1 Cal. 3d at 927. We decline to do so. It is the law of this circuit that the admonition required by Rule 11 applies only to pleas of guilty or *nolo contendere.*[1] A trial judge need not advise a defendant of his right to confrontation in a trial that is tantamount to a plea of guilty in which each of the elements of the crime are stipulated to and no defense is offered. *United States v. Miller,* 588 F.2d 1256, 1264 (9th Cir. 1978) (citing *United States v. Terrack,* 515 F.2d 558, 561 n.3 (9th Cir. 1975)), *cert. denied,* 440 U.S. 947 (1979).

It should be noted that Schuster did not stipulate to facts conclusively demonstrating his guilt in order to preserve his right to raise an affirmative defense on appeal, as did the appellants in *Terrack* and *Miller*. Instead, the court was advised by Schuster's trial counsel that the issue of guilt was to be determined by the court and "the government still has the ultimate obligaton of proving the elements of the crime charged."

The government submitted the issue of guilt to the court upon the stipulated facts without making an oral argument. Thereupon, Schuster's attorney moved for a judgment of acquittal. Counsel argued that there was no evidence to show that Schuster had knowledge that "he was doing anything wrong." The trial court was told that the evidence established "simple association" and not a conspiracy because of the absence of any proof of an agreement. We cannot say in the face of Schuster's vigorous attack on the sufficiency of the evidence at trial that the stipulation was a de facto plea of guilty.[2]

The stipulation was also conditioned upon Schuster's right of appeal "should he so elect." Precisely as contemplated at the time the stipulation was accepted by the court, Schuster has challenged the sufficiency of the evidence of guilt on this appeal. We are satisfied from our review of the stipulation that this contention lacks merit.

The evidence presented to the trial court was sufficient to show that Schuster knowingly participated in a conspiracy to launder money obtained from narcotics trafficking. The facts set forth in the stipulation showed that Dorothy Hackett (Hackett) was a member of a conspiracy, which provided a money laundering service for major narcotics peddlers. Hackett picked up large quantities of currency from Samuel Schuster in 1981 and 1982. Hackett advised Schuster that an official at Security

National Bank was being bribed not to file currency transaction reports concerning the money provided by Schuster. The evidence also reflected that Schuster directed that laundered money be disbursed in interstate and foreign commerce and that Schuster paid one-half of one percent for the laundering service.

Viewing the stipulated facts and the logical interferences that can be drawn therefrom in the light most favorable to he government, there is substantial evidence of Schuster's guilt of the crime charged beyond a reasonable doubt. *See United States v. Chesher,* 678 F.2d 1353, 1357-58 (9th Cir. 1982) (where a case is submitted on stipulated facts, we must determine if such proof presents substantial evidence of guilt beyond a reasonable doubt).

As Schuster voluntarily consented to a court trial based on stipulated facts that demonstrate his guilt, we must AFFIRM.

FOOTNOTES

[1]Other circuit courts have held that the Rule 11 advisements are applicable to stipulations that amount to a plea of guilty. *E.G., Julian v. United States,* 236 F.2d 155 (6th Cir. 1956); *United States v. Brown,* 428 F.2d 1100 (D.C. Cir. 1970).

[2]In fairness to Schuster, it should be noted that our research has disclosed to us that the California Supreme Court no longer restricts the requirement of an admonition of the right to confrontation to cases that are tantamount to a plea of guilty. In *Bunnell v. Superior Court,* 13 Cal.3d 592, 119 Cal. Rptr. 302, 531 P.2d 1086 (1975), the court held that "the record shall reflect such advice, waivers, and acknowledgment by the defendant of his understanding of these consequences in *all* submissions." *Id.* at 605 (emphasis added). The court thus abandoned "[t]he distinction heretofore established between submissions that are 'tantamount to a plea of guilty' and those in which the defendant actively contests his guilt . . . ." *Id.* This court's decisions have never made this distinction.

APPENDIX "B"

MR. PERRY: I would first approach with the waiver and the stipulation.

I would direct the Court's attention to Page 2. That is the only change from the copy. We have agreed to strike one sentence.

(Court reading document)

THE COURT: Now, Mr. Takiff, do you think it is appropriate for me to await signature approval of the waiver of trial by jury before you make your comments or not?

MR. TAKIFF: I would think so, your Honor. I don't think I am going to say anything that is tremendously unique, but I feel the Court should await my comments.

THE COURT: All right. Go ahead.

MR. TAKIFF: If it please the Court, Mr. Schuster has executed his name to the waiver of jury trial with the understanding that your Honor will sit as a trier of the law and facts.

He has been advised by me that, even though we are proceeding in this rather streamlined form, that the government still has the ultimate obligation of proving the elements of the crime charged to the exclusion of every reasonable doubt.

He has been further advised by me that in the event that this Court were to find him guilty, that Mr. Perry and I have agreed that he will, by this method of disposition, preserve his rights to appeal to the Ninth Circuit should he so elect; that he will be enlarged on the selfsame bond that he is presently enlarged on in the event this Court finds him guilty, and that that might be modified for him to return to the State of Florida, namely the City of Miami, pending sentence, if the Court does find him guilty.

With those very brief caveats, those are the only conditions Mr. Schuster has been told about by me, and in largest measure those factors that the Court will follow the law — that the Court must be convinced beyond a reasonable doubt; that he will be permitted to be enlarged on bond, and have his rights to appeal preserved are the factors which have helped influence his signature on that particular document.

THE COURT: All right. Thank you, Mr. Takiff.

Mr. Schuster, do you concur in the comments made by your attorney that those are the conditions under which you executed the stipulation of facts and the waiver of trial by jury?

DEFENDANT SCHUSTER: Yes, your Honor.

THE COURT: All right. You may be seated, Mr. Schuster.

I am going to approve the waiver of trial by jury and signed by the defendant, his counsel and by the prosecutor. All right.

So I will sign it now and give it to the clerk for filing.

(Brief pause)

Mr. Perry furnished me with a copy of this stipulation earlier. I have reviewed it. I have noted the change on Page 2, I guess.

Is that the only change?

MR. PERRY: That's correct, your Honor.

THE COURT: So I know the scope of the stipulation, and the Court is familiar with the testimony incorporated by reference of two witnesses, I believe.

MR. TAKIFF: Yes, your Honor. Lyons and Hackett.

THE COURT: All right. First of all, does either side want to argue it?

. . .

THE COURT: All right.

Well, I don't hesitate much, and the reason I don't hesitate much is because I sat through one trial and heard a number of other people on this matter. So I am familiar with the facts, and I guess there is nothing in the stipulation that is much of a surprise to me.

In the face of the stipulation, and having heard the testimony of Dorothy Hackett, I just have to conclude that the guilt of this defendant Samuel Schuster on Count One is proved beyond a reasonable doubt. Specific findings, I guess, are not required.

But I do find beyond a reasonable doubt the conspiracy described in the indictment, Mr. Perry says at least with respect to Objects 1, 3 and 4, was willfully formed, existed during the period alleged in the indictment. And Samuel Schuster was a willful and knowing member of that conspiracy, and that numerous overt acts alleged in the indictment were committed by one or more persons who were conspirators at the time that the overt act was committed, and at the time that Samuel Schuster was a member of the conspiracy.

Just one overt act: As an example, Paragraph 10 of the stipulation with respect to Alicia Koele's testimony as it tracks Overt Act 52 alleged in the indictment, and a number of other overt acts I think are proved beyond a reasonable doubt.

I also find beyond a reasonable doubt that the overt acts were done knowingly in furtherance of Objects 1, 3 and 4 of the conspiracy as charged in the indictment.

So, for all of those reasons, I find the defendant Samuel Schuster guilty as charged in Count One of the Second Superseding Indictment as submitted to the Court.

. . .

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. SAMUEL SCHUSTER, Defendant-Appellant.	No. 83-5178 D.C. No. CR 82-518-B-AWT (Central District of CA) ORDER

BEFORE: GOODWIN, SNEED, and ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. R. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on October 9, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Assistant U.S. Attorney
Robert Perry
U.S. Courthouse, 14th Floor
312 North Spring Street
Los Angeles, California 90012
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 9, 1984, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Office-Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-579

In the Supreme Court of the United States

OCTOBER TERM, 1984

SAMUEL SCHUSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner voluntarily waived his right to a jury trial and agreed to a trial on stipulated facts and evidence.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 734 F.2d 424.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1984. A petition for rehearing was denied on August 10, 1984 (Pet. App. A8). The petition for a writ of certiorari was filed on October 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts and evidence before the United States District Court for the Central District of California, petitioner was convicted on one count of conspiracy to launder money received from narcotics transactions, in violation of 18 U.S.C. 371. Petitioner was sentenced to five years' imprisonment and a fine of $10,000. The court of appeals affirmed (Pet. App. A1-A4).

1. Petitioner was charged in seven counts of a 19-count indictment with offenses related to a scheme to launder $29,000,000 in currency derived from narcotics sales. Count 1 charged that petitioner participated in a conspiracy to cause financial institutions to fail to file currency transaction reports (in violation of 31 U.S.C. 5322), to fail to file currency transaction reports (in violation of 31 U.S.C. 5322), to violate the Travel Act (18 U.S.C. 1952), and to defraud the government by obstructing the lawful functions of the Internal Revenue Service (in violation of 18 U.S.C. 371). Petitioner was also charged in a second conspiracy count and five substantive counts. Excerpt of Record (E.R.) 1-28.

The trial of petitioner and five co-defendants began on March 8, 1983. On March 30, 1983, the court granted a motion for mistrial with respect to petitioner and three of his co-defendants, and their trial was severed. See E.R. 37-38.

2. On May 19, 1983, petitioner signed a waiver of his right to a jury trial and requested to be tried by the court (E.R. 29). His counsel signed a statement on the waiver form representing that petitioner "was fully advised as to the rights of an accused under the Constitution and laws of the United States to a speedy and public trial by jury" and counsel's belief that the waiver was "voluntarily and understandingly made" (*ibid.*).

On the same day, petitioner, his counsel, and the prosecutor entered into a stipulation reciting that petitioner "has agreed to waive trial by jury and to proceed to trial before the court on count one" on the stipulated facts and evidence, in exchange for which the government agreed to dismiss the six other counts against petitioner if he were found guilty on the conspiracy charge (E.R. 30). The stipulation incorporated by reference the testimony of two witnesses at the trial of some of petitioner's co-defendants. It

specified that two admitted members of the conspiracy testified that petitioner gave others large sums of money for laundering, that he was present during conversations concerning the bribery of bank officers, and that he was paid fees for laundering money and paid fees to others during the course of the scheme. The stipulation further specified that an agent of the Drug Enforcement Administration testified that a ledger taken from the residence of a co-defendant showed large currency transactions with "Samuel," and that, in the agent's expert opinion, the ledger reflected sales of cocaine on credit and disbursements of money derived from those sales. The stipulation also stated that several recorded conversations between petitioner and his co-defendants concerned wire transfers of laundered funds and arrangements made by petitioner for one of his co-defendants to pick up large quantities of currency. *Id.* at 30-36.

Following a colloquy with petitioner's counsel and an inquiry of petitioner, the court accepted the waiver and stipulation. Counsel represented that he advised petitioner "that the government still has the ultimate obligation of proving the elements of the crime charged to the exclusion of every reasonable doubt" and that, should he be found guilty, his "rights to appeal" would be "preserve[d]." Pet. App. A5. Petitioner responded affirmatively when asked by the court whether he concurred in his counsel's statement as to "the conditions under which [he] executed the stipulation of facts and the waiver of trial by jury" (*id.* at A6).

Counsel then argued to the court that the stipulated facts did not establish petitioner's guilt (Tr. 6-12). He stated that "there is no evidence that [petitioner] knew that he was doing something wrong" and that the stipulated facts did not show the agreement necessary to prove a conspiracy (Tr. 7-8). The court convicted petitioner, finding that three of the four objects of the conspiracy had been proved beyond a reasonable doubt (Pet. App. A7).

3. The court of appeals affirmed (Pet. App. A1-A4). The court rejected petitioner's arguments that the district court was required to advise him of his right to confrontation and that the evidence was not sufficient to support his conviction. The court noted that petitioner "did not stipulate to facts conclusively demonstrating his guilt in order to preserve his right to raise an affirmative defense on appeal" (*id.* at A3). In light of petitioner's "vigorous attack on the sufficiency of the evidence," it was clear to the court that the stipulation did not amount to a "de facto plea of guilty" (*ibid.*). The court concluded that petitioner "voluntarily consented to a court trial based on stipulated facts" (*id.* at A4).

ARGUMENT

Petitioner contends (Pet. 7-16) that the district court erred in not advising him of his right to confront the witnesses against him, which he waived as a result of his agreement to be tried on the basis of the stipulation. Despite his allegation of a conflict among the circuits, petitioner does not cite a single case establishing a rule under which his conviction would be set aside. The district court adequately established the voluntariness of petitioner's decision to waive his right to a jury trial and to proceed on the facts and testimony embodied in the stipulation. Petitioner's claim to the contrary does not warrant further review, especially in light of the absence of prejudice and the diminished significance of stipulated-facts trials following the recent amendment to the Federal Rules of Criminal Procedure authorizing conditional guilty pleas.

1. Petitioner's agreement to be tried on the basis of the stipulation is constitutionally unobjectionable so long as he "knew what he was doing when he entered into the stipulation." *United States* v. *Stalder*, 696 F.2d 59, 62 (8th Cir. 1982); see, *e.g.*, *United States* v. *Tobin*, 701 F.2d 1108, 1110

(4th Cir. 1983); *United States* v. *Lawson*, 682 F.2d 1012, 1016 (D.C. Cir. 1982); *United States* v. *Terrack*, 515 F.2d 558, 560 (9th Cir. 1975). The court of appeals correctly applied that rule to the facts of this case. There plainly was an adequate waiver of petitioner's right to a jury trial, the "critical decision" (*Lawson*, 682 F.2d at 1016) involved in the agreement to a trial on stipulated facts. He signed a standard waiver form, and the court expressly inquired of petitioner as to his waiver (see pages 2-3, *supra*). Petitioner also affirmed to the court his understanding of the effect of the stipulation (page 3, *supra*). Petitioner does not contend that the stipulation was the result of "prosecutorial over-reaching, * * * * * that he was under any compulsion to make the challenged stipulation or that he had ineffective assistance of counsel." *United States* v. *Robertson*, 698 F.2d 703, 708-709 (5th Cir. 1983). The court's inquiry was sufficient to demonstrate that petitioner acted voluntarily and understood the consequences of his decision. The fact-bound claim to the contrary, rejected by the court below, does not merit this Court's review.

In particular, the record amply supports a conclusion that petitioner was aware of and voluntarily chose to forgo his confrontation rights. Only two months before, petitioner had been tried before a jury (see page 2, *supra*). In light of this experience, he surely knew of the right of cross-examination; nothing in the record suggests he did not. And by entering into the stipulation, petitioner must have been aware that he would not be receiving a trial at which witnesses would be called and cross-examined. As the court noted in *United States* v. *Stalder* (696 F.2d at 62), in rejecting a similar challenge to a stipulation:

> The claim that the defendant thought that he was waiving only a jury trial, and that some kind of court trial would still take place, is simply untenable on the

> face of the record. The colloquy as a whole reflects clearly not only that a jury trial was waived, but that no trial at all would take place * * * .

See generally *Diaz* v. *United States*, 223 U.S. 442, 452-453 (1912) ("the accused, by his voluntary act, placed in evidence the testimony disclosed by the record in question, and thereby sought to obtain an advantage from it[;] he waived his right of confrontation as to that testimony and cannot now complain of its consideration"). On these facts, further inquiry by the district judge — who had presided at petitioner's earlier trial — was not required.

2. There is no basis for petitioner's proposed requirement that he be advised by the court of his confrontation rights.[1] Petitioner analogizes to Fed. R. Crim. P. 11(c), which requires that the court inform a defendant of specified rights before accepting a plea of guilty or nolo contendere.[2] Petitioner did not, however, stipulate to facts conclusively demonstrating his guilt. To the contrary, petitioner

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[1]This Court's cases addressing the question of waiver of confrontation rights do not support petitioner's argument. Those cases do not impose a requirement that the court advise a defendant with respect to his confrontation rights. Moreover, they arose in quite different circumstances from this case and do not suggest that judicial advice is required on these facts, where petitioner expressly agreed with his counsel's decisions and representations. See *Barber* v. *Page*, 390 U.S. 719, 725 (1968) (failure to cross-examine witness at preliminary hearing not a waiver of confrontation rights at trial); *Brookhart* v. *Janis*, 384 U.S. 1, 7 (1966) (counsel's waiver was "inconsistent with his client's expressed desire"); *Douglas* v. *Alabama*, 380 U.S. 415, 420-423 (1965) (counsel's failure to continue objecting to each question after objecting three times did not constitute a waiver).

[2]Rule 11(c) provides:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any,

argued the sufficiency of the evidence to both courts below, and his stipulation was not only to facts, but to testimony that need not have been credited by the court. See, *e.g.*, *United States* v. *Dorsey*, 449 F.2d 1104, 1108 (D.C. Cir. 1971). Under these circumstances, Rule 11 plainly does not apply. See, *e.g.*, *United States* v. *Lawson*, 682 F.2d at 1015 ("[i]n cases where defendants have not admitted guilt and waived trial on all issues, courts have uniformly held that a Rule 11 inquiry is not required"); *United States* v. *Stalder*, *supra* (Rule 11 does not apply even where defendant effectively stipulates to his guilt); *United States* v. *Terrack*, *supra* (same).[3]

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and the maximum possible penalty provided by law, including the effect of any special parole term; and

* * * * *

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if his plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial;

[3]It has been suggested that Rule 11 should apply (at least in part) when the defendant, in effect, stipulates to his guilt in order to obtain appellate review of a pretrial ruling. See *Witherspoon* v. *United States*, 633 F.2d 1247 (6th Cir. 1980), cert. denied, 450 U.S. 933 (1981); *United States* v. *Strother*, 578 F.2d 397 (D.C. Cir. 1978). Although we believe that this suggestion is wrong — Rule 11 by its terms applies only to guilty and nolo contendere pleas, which have different consequences from trials even where all facts are stipulated —that question is not presented here, because petitioner's stipulation did not effectively constitute a plea of guilty.

Petitioner was in any event not prejudiced by the district court's failure to inquire more fully into the circumstances surrounding his agreement to the stipulation. Even under Rule 11, a departure from the specified procedures may constitute harmless error (Fed. R. Crim. P. 11(h)). Petitioner was present at his trial; his chief complaint seems to involve the incorporation by reference of testimony from the trial of his co-defendants. But such incorporation is not in itself improper. See, *e.g., United States* v. *Dorsey, supra.* Petitioner does not suggest that the content of the testimony was unknown to him or that the district court's reliance on it came as a surprise. Compare *Julian* v. *United States*, 236 F.2d 155, 158 (6th Cir. 1956) ("it is not contended that defendant acquiesced in or approved of the stipulations of defense counsel"). Nor does petitioner point to other facts suggesting that he might not have entered into the stipulation, or that he might have changed it, had he been questioned more extensively by the court. Moreover, petitioner does not suggest that the government would not have been able to prove any of the facts to which he stipulated.[4] Under these circumstances, any error was harmless. See *United States* v. *Hasting*, 461 U.S. 499 (1983); compare *United States* v. *Brown*, 428 F.2d 1100, 1103 (D.C. Cir. 1970) (inquiry before accepting stipulation required where the "defendant [was] admittedly suffering from a mental disorder").

3. Finally, Rule 11 was amended in 1983 to provide for conditional guilty pleas, which permit a defendant, with the approval of the court and the government, to enter a plea of guilty while reserving the right to appeal from an adverse

---

[4]Petitioner's two co-conspirators who did not obtain a mistrial were convicted at the trial during which the testimony incorporated in the stipulation was given. The district court commented on the similarity between the contents of the stipulation and the evidence produced at the earlier trial (Pet. App. A7).

determination of a pretrial motion (Fed. R. Crim. P. 11(a)(2)). While this procedure is not available to preserve every challenge that a defendant might wish to pursue on appeal,[5] it will often obviate the need to employ the device of a trial on stipulated facts. See, *e.g.*, *United States* v. *Stalder*, 696 F.2d at 60 n.2; *United States* v. *Dorsey*, 449 F.2d at 1108 n.18 (problems relating to stipulated-facts trials arise because defendants are unable to obtain appellate review of rulings on suppression motions if they plead guilty). Questions related to trials on stipulated facts can therefore be expected to arise with less frequency than they may have under prior law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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STEPHEN S. TROTT
Assistant Attorney General

KAREN I. SKRIVSETH
Attorney

DECEMBER 1984

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[5]See, *e.g.*, *United States* v. *Curcio*, 712 F.2d 1532, 1537 (2d Cir. 1983). The procedure would not, for example, preserve for appellate review issues that can only be addressed on a full trial record, such as the sufficiency question raised below.